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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1945—No. 1021

In the Matter of

CHILDS COMPANY, Debtor

In Proceedings for Reorganization under Chapter X of the Bankruptcy Act—No. 82,878.

THE 415 FIFTH AVENUE COMPANY, INC.,
Petitioner,

against

JOHN F. X. FINN, as Trustee of Childs Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LOWELL M. BIRRELL,
Counsel for Petitioner.

THEODORE E. LARSON,
Of Counsel.

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JOHN F. X. FINN, as Trustee of Childs Company, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your Petitioner, The 415 Fifth Avenue Company, Inc. respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court entered in the above entitled proceeding on January 8, 1946. Said decree affirmed an order of the District Court for the Southern District of New York, dated June 26, 1945 (R. 25) which extended until July 1, 1946, the time within which the Debtor and its Trustee, the respondent, were required to surrender to petitioner-owner the premises 1551 Broadway, New York City, pursuant to a prior order of the District Court dated September 27, 1944 (R. 7) adjudging that the lease thereof by peti-

tioner's predecessor, as landlord, to the Debtor, as lessee, had terminated on June 23, 1944 and ordering respondent and the Debtor to surrender the premises within thirty (30) days from September 27, 1944. The Circuit Court of Appeals sustained the District Court in holding that it was obliged to grant the extension of time, because of the enactment of Chapter 314 of the New York Laws of 1945, in effect March 28, 1945. This statute, which will be referred to herein as the Rent Control Law, declared that an emergency with respect to business space existed in New York City, which would continue until July 1, 1946 and prohibited the eviction of any tenant of business space during that period, if the tenant paid an "emergency rent" equal to the rent in effect on June 1, 1944 plus 15% thereof.

I.

Summary and Short Statement of the Matter Involved.

The lease was for a term commencing May 19, 1941 and expiring May 1, 1947, with renewal privileges, and gave the landlord the right to terminate if the Debtor filed a petition in bankruptcy, or was adjudicated a bankrupt, or if a trustee was appointed for the Debtor's property (R. 4). On August 26, 1943, the Debtor filed its petition for reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Southern District of New York. On the same day the District Court approved the petition and appointed respondent as the Debtor's Trustee (R. 16). Respondent then took possession of the premises. On June 23, 1944, petitioner exercised its right of termination by written notice to respondent and the Debtor (R. 2). On the application of peti-

tioner (R. 4) the District Court granted the order of September 27, 1944 (R. 7), which was affirmed by the Circuit Court of Appeals for the Second Circuit on January 18, 1945 (R. 16). Pending the appeal, execution of the order was stayed (R. 10). Respondent's petition for certiorari was denied by this Court on May 7, 1945 (R. 18).

By another order, also dated September 27, 1944, granting the petition of Burton C. Meighan, the landlord of the adjoining premises 1553 Broadway (which had been leased to the Debtor by a lease providing that it should terminate in the event of the Debtor's insolvency), it was adjudged that the latter lease had terminated on August 26, 1943, the date of the appointment of the trustee. This order, which directed that the latter premises be surrendered to Mr. Meighan within thirty days, was also affirmed by this Court on January 18, 1945 (R. 16).

By order dated February 1, 1945, the time for surrender of 1551 Broadway to petitioner and 1553 Broadway to Mr. Meighan, was extended to February 26, 1945 (R. 11). Upon the application of respondent, on February 9, 1945, this Court stayed execution of the mandate of the Circuit Court, issued upon the affirmance of the order of September 27, 1944 for the surrender of 1553 Broadway to Mr. Meighan, pending application for a writ of certiorari with respect to the proceedings affecting the latter premises only. Such writ was granted on March 5, 1945 (R. 17) and on May 21, 1945 this Court affirmed (R. 32).

Although petitioner was not a party to or in any way affected by the review in this Court respecting 1553 Broadway, the District Court granted two other orders delaying the surrender of 1551 Broadway to petitioner, to await the outcome of the appeal to this Court from the mandate for the surrender of 1553 Broadway. The first of these orders, dated February 27, 1945 (R. 12) postponed the

time for the surrender of 1551 Broadway to petitioner until the eighteenth day after the granting or denial of certiorari with respect to 1553 Broadway. After certiorari was granted, the second order, dated March 16, 1945 (R. 14) further postponed the surrender of 1551 Broadway until the eighteenth day after the decision of this Court on the appeal relative to 1553 Broadway. That decision having been rendered on May 21, 1945, the time for surrender under the second order, expired on June 8, 1945.

On May 16, 1945 (R. 16) respondent petitioned the District Court for a further postponement until July 1, 1946, on the ground that under the Rent Control Law respondent had the right to remain in possession until the expiration of the emergency on that date, upon payment of the emergency rent, which had been offered to and refused by the petitioner (R. 19). The District Court granted the petition by the order of June 26, 1945, which, as above stated, was affirmed by the Circuit Court on January 8, 1946. Neither the opinion of the Circuit Court of Appeals, nor of the District Court (R. 31), has been reported.

The relevant provisions of the Rent Control Law are as follows:

Section 1 declaring the existence of an emergency created by oppressive leases and agreements for rent of business space, which rendered the legislation necessary.

Section 2 defining various terms used in the law, as follows:

(a) Defining business space, in terms which include petitioner's premises.

(c) Defining emergency rent as the rent reserved or payable under any lease, agreement or tenancy of business space in force on June 1, 1944, plus 15% thereof.

(e) " 'Tenant.' A lessee, sublessee, licensee, or other person entitled to the possession or to the use or occupancy of the whole or a part of any business space."

Section 8 providing as follows:

> "So long as the tenant continues to pay the rent to which the landlord is entitled, under the provisions of this act, no tenant shall be removed from any business space, by action or proceeding to evict or to recover possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and notwithstanding the issuance of any order to dispossess, warrant or process prior to the effective date of this act, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which is inconsistent with any of the provisions of this act, unless:
>
> (e) The tenant, whose lease or rental agreement has expired or shall hereafter expire during the continuance of the emergency declared by this act, has refused, subsequent to the date this act takes effect and within a period of six months prior to such expiration, to execute, upon demand of the landlord, a renewal of the prior lease or rental agreement for a further term of like duration or for such shorter term as the landlord may elect, on substantially similar terms and conditions as are contained in such prior lease or rental agreement, provided that the terms and conditions of such renewed lease or rental agreement are not inconsistent with any of the provisions of this act, and provided further that the rent reserved in such renewed lease or rental agreement may be any amount not in excess of the emergency rent for such tenant's business space. The landlord shall not be entitled to seek a fixation of rent pursuant to section four of this act where the rent reserved in any such renewed lease or rental agreement is less than the emergency rent."

II.

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347) and Section 24 (c) of the Bankruptcy Act.

III.

The Questions Presented and Reasons for Granting the Writ.

QUESTION 1. Whether the enforcement of a lawful final order of a District Court of the United States, disposing of property of the estate of an insolvent over which it had jurisdiction, can be enjoined or postponed by legislation subsequently enacted by the State in which the District Court sits and in which the property is located.

REASON—The Circuit Court of Appeals erred in deciding that the power of the District Court to enforce its order of September 27, 1944, as amended, was subject to the restraints imposed by the Rent Control Law.

QUESTION 2. Whether respondent was a tenant of petitioner's premises, within the meaning of Section 2 (e) of the Rent Control Law, by virtue of his continued possession pursuant to stays by the District Court of the execution of its order for his removal, pending appeal to this Court from the mandate for his removal from adjacent premises.

REASON—The Circuit Court misconceived the effect of the stays in holding that for their duration respondent was "entitled" to possession.

QUESTION 3. Whether the Rent Control Law, assuming its applicability to the order of September 27, 1944 and the orders postponing surrender of possession (*supra* pp. 3, 4), would merely restrain the procedural steps necessary to enforce substantive rights previously adjudicated by such orders and would therefore not be binding on the Federal District Court.

REASON—The District Court having, long prior to the enactment of the Rent Control Law, finally adjudged that the lease and all rights of respondent and the Debtor had ceased, thus definitively adjudicating all substantive rights and leaving in abeyance only those proceedural matters relating to enforcement, it was error for the Circuit Court to hold that a question of substantive local law was involved.

QUESTION 4. Whether Section 8 (e) of the Rent Control Law denies to petitioner the equal protection of the law in violation of the Fourteenth Amendment, in that it accords to the landlord of a solvent tenant the right of eviction where the tenant refuses to renew an existing lease, whereas a landlord of a bankruptcy trustee could not invoke this protection in view of the limitations upon the power of such trustee.

REASON—The Circuit Court erred in failing to hold that such discrimination rendered the statute unconstitutional as applied to the present case.

WHEREFORE petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Second Circuit be reversed; and that petitioner be granted such other and further relief as may be just and proper.

Dated: New York, N. Y.
March 29th, 1946.

LOWELL M. BIRRELL,
Counsel for Petitioner.